

Scianni, Melissa

From: Quast, Sylvia
Sent: Friday, February 27, 2015 7:49 AM
To: Diamond, Jane
Subject: Re: Corps responses to Greenwire Reporter on Salt Pond JD

Are you going to be on the 8:30 DOGGR call?

Sent from my BlackBerry 10 smartphone.

Original Message

From: Diamond, Jane
Sent: Friday, February 27, 2015 7:39 AM
To: Rao, Kate; Quast, Sylvia; Strauss, Alexis; Blumenfeld, Jared
Subject: FW: Corps responses to Greenwire Reporter on Salt Pond JD

-----Original Message-----

From: Brush, Jason
Sent: Thursday, February 26, 2015 3:00 PM
To: Zito, Kelly; Skadowski, Suzanne; Keener, Bill
Cc: Kermish, Laurie; Campbell, Rich; Scianni, Melissa; Woo, Nancy; Diamond, Jane
Subject: Corps responses to Greenwire Reporter on Salt Pond JD

-----Original Message-----

From: Eakle, Wade L SPD [mailto:Wade.L.Eakle@usace.army.mil]
Sent: Thursday, February 26, 2015 2:49 PM
To: Brush, Jason
Cc: McAllister, Victoria L SPD; Domurat, George W SPD
Subject: FW: Media Query -- Greenwire Reporter on Salt Pond JD - GUIDANCE FROM HQUSACE ON CARGILL/REDWOOD CITY JD (UNCLASSIFIED)

Classification: UNCLASSIFIED

Caveats: NONE

Jason,

FYI, below has been shared with EPA PAO.

Wade Eakle, MS, CWB
Ecologist & Regulatory Program
Manager
US Army Corps of Engineers
South Pacific Division
415-503-6577, fax -6647

-----Original Message-----

From: McAllister, Victoria L SPD
Sent: Thursday, February 26, 2015 2:26 PM

To: Toy, R. Mark BG; Morrow, John C LTC SPN; McFadden, Eric M COL SPD; Goodenough, Merry SPN; Sato, Kathleen M SPN; Dykstra, Daniel J SPN; Anderson, Jesse L SPN; Wang, Roselyn J SPN; Hicks, Jane M SPN; Galacatos, Katerina SPN; Wu, Timothy P CPT ARMY @ SPD; Kuz, Annette B SPD; Eakle, Wade L SPD
Cc: Czekanski, Adam J MAJ SPN; Rakstins, Arijs A SPN; Durrie, Harry L SPN
Subject: RE: Media Query -- Greenwire Reporter on Salt Pond JD - GUIDANCE FROM HQUSACE ON CARGILL/REDWOOD CITY JD (UNCLASSIFIED)

Sir and Team,

USACE response approved by BG Peabody and Steve Stockton has been provided to Greenwire Reporter Annie Snider on Redwood City Saltworks. Because many of the questions involve EPA and the answers to Q 1 and 2 specifically direct the reporter to EPA HQ asked me to share this response with EPA Region IX PAO. I am preparing to do this now so EPA is know what USACE has said when PAO gets the call.

Please let others appropriate in EPA know this is in motion. USACE PAO POC is Gene Pawlik.

VR,

Torrie McAllister
Public Affairs Director
U.S. Army Corps of Engineers South Pacific Division
415-503-6514

USACE Response to Greenwire Media Query, Reporter Annie Snider, 26 FEB 2015

1. General Statement:

In a written request in May 2012, Redwood City Saltworks asked the U.S. Army Corps of Engineers (Corps) to provide a jurisdictional determination under the Rivers and Harbors Act of 1899 (RHA) and the U.S. Environmental Protection Agency (EPA) to provide a jurisdictional determination under the Clean Water Act for the 1,365 acres that comprise the Redwood City Salt Plant. EPA responded in October of that year, stating that the Corps should follow normal procedures and make the approved jurisdictional determination under both the RHA and the CWA, with EPA providing technical support.

The Corps vertical team, including Regulatory professionals and Counsel, engaged in a robust dialogue of the case-specific facts and applicable legal standards pertaining to RHA and CWA jurisdiction of the Redwood City Salt Plant site. Ultimately, this discussion and analysis resulted in the development of legal principles to guide the jurisdictional determination for this site by Corps' Chief Counsel. Following a review by the Office of the Assistant Secretary of the Army for Civil Works, including legal counsel, Corps Headquarters was tasked by that office in November 2014 with completing the approved jurisdictional determination. Following that direction, Corps Headquarters has undertaken the task to providing a carefully considered, legally defensible, decision in a timely manner, understanding that Redwood City Saltworks has been waiting for a response from the Corps (and EPA) since May 2012.

Q&As

1 – The developer requested that EPA be involved in the process from the beginning, and that EPA issue the final JD. Was this request considered? Why didn't EPA take over responsibility for the JD?

Answer: I would recommend that you ask EPA to respond to this question.

2 – When did EPA Region 9 become involved in the process? What has the collaboration between EPA and the Corps looked like?

Answer: EPA Region 9 was asked by Redwood City Saltworks to do the CWA AJD in May 2012. They declined. Ultimately, Region 9 requested of EPA HQ that a “special case” be designated in accordance with a 1989 Memorandum of Agreement between EPA and the Army establishing the policy and procedures the agencies will follow in determining jurisdiction for purposes of section 404 of the CWA. I would recommend that you ask EPA to respond to this question, as well, because it might have more information.

3 – Who collaborated on the legal guidance memo written by Earl Stockdale and sent to the San Francisco District on Jan. 15, 2014? Was EPA involved with its drafting? Was Corps headquarters regulatory involved with its drafting? Was Department of Justice involved?

Answer: The Corps’ legal guidance was prepared by the former Chief Counsel and his staff, after coordination with subordinate Corps legal offices and Corps regulatory and technical experts.

4 – How common is this sort of legal guidance? How many other legal guidance memos for Clean Water Act jurisdiction were issued in calendar year 2014?

Answer: Legal guidance on jurisdictional questions under the Clean Water Act is a normal function of the Corps’ Office of Counsel.

5 – Why did the memo not go through public notice & comment?

Answer: Legal memoranda advising agency clients are not subject to public notice and comment processes.

6 – Local environmental groups say that salt ponds in the San Francisco Bay area have consistently been ruled jurisdictional, including at a similar site in Napa County. Is this true? Have any salt ponds in the area received final JDs that found no jurisdiction?

Answer: All AJDs are site-specific, fact-based determinations that are informed by legal standards. AJDs are used to indicate which aquatic resources on a specific site, if any, are or are not jurisdictional under federal law. AJDs are not transferrable from one site to another, as each site is unique. Corps districts are required to post all AJDs on their websites.

7 - What other types of sites might this legal theory of “what constitutes a water” apply to?

Answer: As noted above, all AJDs are site-specific, fact-based determinations that are informed by legal standards. AJDs and the legal opinions to support them are not transferrable from one site to another.

8 – Is it true that Earl Stockdale retired last year? If so, what was the date of his retirement?

Answer: Mr. Stockdale retired last autumn after more than 40 years of service with the Department of the Army.

9 – When did Corps headquarters take over the JD from the San Francisco district?

Answer: As noted above, in November 2014, the ASA(CW) directed that the decision on jurisdiction be made by Corps Headquarters.

10 – Where does the jurisdictional determination stand now? Is a JD imminent? Will it be issued by the Corps?

Answer: HQUSACE has continued to gather, evaluate, and deliberate on the facts, and will render a decision in the near future, unless the EPA chooses to treat the matter as a “special case” in accordance with the 1989 memorandum mentioned above.

11 – Is the option of EPA taking over the JD still on the table?

Answer: Yes. EPA has the ultimate authority to determine geographic jurisdiction under section 404 of the Clean Water Act. Thus, EPA can “take over” the jurisdictional determination at any time and has always had the authority to do so.

12 – Is the Corps considering withdrawing the Stockdale guidance memo?

Answer: No.

Classification: UNCLASSIFIED

Caveats: NONE